



THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of) Group Art Unit: 3673
Julia S. FAIRCLOTH et al.) Examiner: Conley, Fredrick C.
Serial Number 10/661,698) Attorney Reference: PIL001
Filed: September 12, 2003)
For: PLAY PILLOW WITH HIDING SPACE)

APPEAL BRIEF

Commissioner for Patents

P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Appellants hereby appeal to the Board of Patent Appeals and Interferences from the decision of the Primary Examiner finally rejecting claims 1-2 and 4-12, 14-18, 23-32, 34-36 in the above-captioned patent application.

(1) Real party in interest.

The real parties in interest are inventors, Julia S. Faircloth and Nellie T. Faircloth, residing at 11025 NE Hurley Lane, Newberg, OR 97132.

(2) Related appeals and interferences.

Appellants are unaware of any appeals or interferences related to the subject appeal.

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(3) *Status of claims.*

Claims 1-2 and 4-36 are pending in the application. Claim 3 was cancelled. Claims 13, 19-22 and 33 were objected to as being dependent upon a rejected base claim but would be allowable if rewritten in independent form. Claims 1, 23, 25 and 34-36 are independent claims.

(4) *Status of amendments.*

In response to the First Office Action mailed March 23, 2004 and the Examiner's Interview of May 4, 2004, a First Amendment was filed on June 21, 2004 incorporating the subject matter agreed allowed in the first Office Action and in the Examiner's Interview.

In response to the Second Office Action mailed November 17, 2004, a Second Amendment was filed February 14, 2005. Both the First and Second Amendments have been entered in full and no further amendments have been made.

No Amendments after final have been filed. Accordingly, the claims are as presented in the attached Claims Appendix.

(5) *Summary of invention.*

Briefly, the present invention is drawn to a pillow having a hiding space. At least one door is sized and positioned to conceal or reveal an opening of the hiding space. The hiding space is a cavity within the pillow capable of removeably receiving and snuggly holding an item, such as a stuffed toy. In a preferred embodiment, the cavity comprises a cavity opening of generally fixed dimension and has cavity sidewalls that billow inward snuggly holding the

removeable item in place while the item is stored in the hiding space. The present invention is particularly suitable for evoking play imagination and providing entertainment for all ages.

(6) *Issues.*

The following grounds of rejection submitted for review were set forth in the final Office Action, mailed June 16, 2005:

- (a) Claims 25, 27, 29-31 and 34-36 were finally rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent Number 6,434,769 to Koenig.
- (b) Claims 1-2, 4-12, 14-18 and 23-24 were finally rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent Number 6,434,769 to Koenig in view of U.S. Patent Number 5,951,111 to Klimenko.
- (c) Claims 26, 28 and 32 were finally rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent Number 6,434,769 to Koenig.

Of the pending claims, claims 13, 19-22 and 33 have been allowed if rewritten in independent form. Appellants hereby appeal the rejections of pending claims 1-2, 4-12, 14-18, 23-32, and 34-36.

Note, claim 13 is allowable if rewritten in independent form but was lumped together in error with claims "4-18" in the statement of rejection on page 5 of the final Office Action.

Note also, claim 34 was not listed under the 35 U.S.C. §102(b) statement of rejection, however, claim 34 was within the arguments on page 3, line 15 ("Claims 34-36...") of the Office Action, dated June 16, 2005, therefore is addressed below as rejected under 35 U.S.C. §102(b).

Note also, claim 35 has been only once rejected. Claim 35 was allowed in the previous Office Action mailed Nov. 17, 2004. However, since claim 35 contains the allowed subject matter of claim 13, it is believed claim 35 is also allowable but was included in the statement of rejection in error.

(7) *Grouping of claims.*

Claims 2, 4, 6 and 15 fall with claim 1.

Claim 26, 27 and 31 fall with claim 25.

Arguments as to why the remaining claims do not fall together and are separately patentable are set forth below.

(8) *Brief Discussion of Prior Art.*

Brief Discussion of Koenig, U.S. Patent Number 6,434,769

Koenig discloses a plush character pillow 1 having recreational accessories 3 within a pouch portion 2. In one embodiment, the plush character toy pillow is in shape of a bear having an outer abdomen formed by an orthopedic pillow 4 which pivots upward to inner abdomen wall portion 7. The space in between the outer abdomen orthopedic pillow 4 and inner wall portion 7 forms a pouch for holding accessories 3.

Accessories 3 appear to comprise a storybook, a puppet or a puppet theater having puppets therein, see Koenig's claims 2, 11-12 (note, Koenig's claim 11 lacks antecedent basis from claim 1, but see claim 2). Puppet theater accessory 201 shown in Figure 6 is described as a "stand-alone" accessory, col. 4, lines 66+, specifically col. 5, lines 12-13. In another

embodiment, Koenig appears to disclose that stand-alone puppet theater accessory 201 may be removeably attached to plush character pillow 1, with VELCRO for example. See col. 5, lines 12-15, col. 3, lines 39-40, and Figure 2A. Puppet theater accessory 201 of Figure 6 may be removeably attached to wall portion 7. See col. 5, lines 10-15.

The puppet theater 201 has a place where a "child can insert his or her hand within an open proximal end of an attached sleeve portion, wherein at a distal end thereof there are provided the puppet portion, such as a plurality of finger puppets or a single hand puppet." Abstract, lines 14-18. See also col. 3, lines 30-40 and Figures 6-7.

Appellants are having a difficult time comprehending the metes and bounds of the Koenig reference due to numerous descriptive errors or complete lack of description in the Koenig patent. For instance, Koenig appears to disclose one embodiment in Figures 1-2 and a second embodiment in Figures 1A-2A (see col. 3, lines 55-65) yet both are labeled with the same reference numeral "1" indicating they are the same plush character toy pillow. Moreover, Koenig discloses theater accessory 201 "may be provided behind pivotal wall portion 7" (col. 5, lines 1-2) yet in the embodiment of Figures 2 and in the embodiment of 2A wall portion 7 is in the same position. There does not appear to be a theater accessory shown *behind* a wall portion 7 anywhere. Further, theater accessory 201 in Figure 2A looks nothing like the theater accessory 201 in Figure 6 yet they have the same reference numeral. The written description appears to apply only to the theater accessory 201 of Figure 6 and not of Figure 2A. It is very unclear what is shown in Figure 2A.

The Examiner appears to improperly jump to the conclusion that the wall portion 7 of Figure 2 is a cavity. This is not clear from Figure 2, consider for example, wall portion 7 could be built outward, entirely flat, or built in forming downwardly opening slot, to name a few

possibilities. We just don't know. Since theater accessory 201 can be removeably attached to wall portion 7 in Figure 2, this would suggest wall portion 7 might be flat. Koenig does mention a "hollow portion" in col. 3, line 31, but it unclear what this hollow portion is, where it is located, or which Figure it applies to. Koenig could be referring to a hollow portion within puppet theater 201 where the puppet sleeve and puppets are, or a hollow portion of the pouch in between outer abdomen orthopedic pillow portion 4 and inner wall portion 7, or a hollow portion like a slot in between orthopedic pillow 4 and wall portion 7 for access to the puppet sleeve of Figure 2A. Koenig is just not clear.

It also appears that the Examiner improperly jumps to the conclusion that Figure 6 has a cavity with a cavity floor. Theatrical set pillow 202 may merely have a curtain backdrop behind the puppet sleeve, the curtain only connecting to the top of theatrical set pillow 202 and the sleeve merely in between the curtain and theatrical set pillow 202, among many other possibilities. Again, the Koenig reference is just not clear and one must be careful not to impart description or structure into the Koenig reference based on impermissible hindsight use of Appellants own teachings.

The Koenig patent is reproduced for reference in Appendix A.

Brief Discussion of Klimenko, U.S. Patent Number 5,951,111

Klimenko discloses inflatable furniture. Klimenko's sofa has a central recess located below a removeable seat cushion for holding ice or ice bags for cooling a person seated on the inflatable sofa. Col. 2, lines 14-20. The inflateable sofa of Klimenko is made of "specially shaped plastic sheets." Col. 1, lines 25-26. One objective of the inflatable sofa furniture of

Klimenko is that the furniture can be deflated and conveniently stored without occupying too much space. Col. 1, lines 24-25. The Klimenko patent is reproduced in Appendix B.

(9) *Arguments.*

Appellants' Response to 35 U.S.C. §102(b) Rejection.

A. The Examiner finally rejected claims 25, 27, 29-31 and 34-36 under 35 U.S.C. §102(b) as being anticipated by Koenig.

To properly reject a claimed invention under 35 U.S.C. §102(b), the Examiner must make a *prima facie* showing that each and every element of the claimed invention is disclosed in a single prior art reference. The Koenig patent was cited initially by Appellants in an IDS submitted upon filing the application on Sept 12, 2003. It is troubling that the Koenig reference is being cited again by the Examiner and only now being applied in a final Office Action especially since the best rejection is supposed to be initially set forth. See MPEP 706.02, "I. CHOICE OF PRIOR ART; BEST AVAILABLE." It appears that the current 102(b) rejection trumps the prior 103(a) obviousness rejection based on multiple references of the Office Action of mailed Nov. 17, 2004. Moreover, it appears the Examiner should have addressed this reference right from the original claims.

Now turning to independent claim 25, Koenig does not teach a "third layer attached *in between* said opening of said cavity and an outer perimeter of said first layer of material." (Italics added for emphasis). Koenig shows in Figure 6, a base 205 attached at an opening in theater accessory 201, that is, at a seam or edge joining the theater accessory inner side and front side. Attaching base 205 at the seam or edge means base 205 is only as wide as the theater

accessory opening, as shown in Figure 6. If base 205 is only as wide as the opening, then both side edges of the base and the side edges of theater accessory opening would tend to show when the base is in the closed position. Moreover, it does not appear an obvious design choice to make base 205 wider since the pop-up features 206 and 207 would seemingly interfere with the front of the theater accessory upon closing base 205.

As illustrated in the present Figure 1C, Appellants show a door 104 attached to a front surface 102 *in between* cavity opening 126 and an outer perimeter 110 of the front surface 102. Appellants' purposely attach the third layer *in between* the cavity opening and the outer perimeter so as to hide the cavity opening from view when the third layer is in the closed position. Appellants' Figures 1A-1C illustrate how cavity opening 126 is entirely hidden from view by door 104 when door 104 is in the closed position. A person viewing Appellants' pillow in Figure 1A is not clued as to what lies behind door 104. Moreover, attachment of door 104 *in-between* the cavity opening and the outer perimeter is not simply a design choice because manufacturing in the present manner requires an extra manufacturing step. A third layer or door attaching step is needed in addition to a cavity sidewall to front layer attaching step. Appellants' third layer attachment cannot simply be achieved when the sidewall layer is attached to the front layer, as it appears to be manufactured in Koenig.

In addition to lacking a third layer attached in between a cavity opening and an outer perimeter, Koenig may not teach a cavity at all. The back of Figure 6 is not explained by Koenig. The portion behind puppets 204 and the puppet sleeve is not discussed. It could be that the puppet sleeve is merely in front of a curtain. In which case, there is no cavity since there is no cavity floor per se.

Also, in regards to independent claims 25 and 34-36, Koenig does not appear to teach at least one item *removeably* stationed in the cavity. That is, the puppets of Koenig do not appear to be removeably stationed within the puppet theater accessory. See Koenig's col. 5, lines 3-4, where theatrical set pillow 202 is discussed as having a "*built in* puppet accessible sleeve 203..." having finger puppets 204 at a distal end. See also Koenig's Abstract where "[Thereafter,] the child can insert his or her hand within an open proximal end of an *attached* sleeve portion, wherein at a distal end thereof there are provided the puppet portion, such as a plurality of finger puppets or a single hand puppet." Abstract, lines 14-17. Nowhere does Koenig teach removing the attached sleeve or the finger puppets from the puppet theater accessory. For a 102(b) rejection to be proper, each an every element must be disclosed in the reference. "[A]n item *removeably* stationed in said cavity" (recited in claim 25, line 10, and similarly in claims 34-36, lines 12) is not disclosed by Koenig. (Italics added for emphasis)

Regarding claim 29, Koenig does not appear to teach a first layer comprising a cavity floor layer where the cavity floor layer is attached to a second layer for preventing the cavity sidewall perimeter layer and the cavity floor layer from turning inside out. Koenig's teaches that theater accessory 201 shown in Figure 6 may be removeably attached to wall portion 7 with VELCRO for example. See col. 5, lines 10-15. The logistics of this attachment and where the VELCRO is applied is not clear. As mentioned, it is questionable whether the theater accessory backdrop is actually cavity floor. Assuming for the sake of argument that the backdrop is a cavity floor layer, and not a partially attached curtain, removeably attaching theater accessory 201 to wall portion 7 would not prevent the backdrop from turning inside out through the theater opening since the backdrop would seemingly separate from it's temporary (i.e., VELCRO) connection and come forward through the theater opening. In contrast, Appellants' pillow illustrated in

Figure 1G has a cavity floor layer 146 sewed or glued to a second layer 148. The second layer 148 being the back layer of pillow 100. When the cavity floor is connected to the second layer, removing stored items from the cavity or even pulling on the sidewalls of the cavity will not cause the cavity to turn inside out, that is, the cavity floor and the cavity sidewalls will not come up through the cavity opening. Appellants have found that attaching the cavity floor to the second layer also adds padding or puffiness to the pillow, and importantly delineates the size of the cavity floor (see dashed line 150 in Figure 1D) which in part controls the degree of cavity sidewall billowing.

Regarding claim 30, the Examiner appears to be drawing on a hodgepodge of Koenig's Figure 6 and then where convenient Koenig's Figures 1-2 and 1A-2A. Note, due to the limited and unclear description of Koenig's embodiments one must be careful not to impart words or structure that is not clearly set forth in Koenig. Claim 25, from which claim 30 depends, was rejected in reference to Koenig's theater accessory 201 of Figure 6. Now with respect to claim 30, which claims an outer perimeter shaped to further illustrate the theme, the Examiner jumps to Koenig's plush character toy of Figures 1-2 or Figures 1A-2A. If the plush character toy bear is being used to reject claim 30, then all of the claimed elements of claim 25 must also appear with respect to the plush character toy bear.

As discussed above, Koenig teaches one embodiment where the theater accessory 201 of Figure 6 may be removeably attached to the plush character toy bear, but does not show this embodiment in full, that is, the actual positioning and attachment of theater accessory 201 to plush character toy bear 1 is not shown. The Examiner appears to allege that theater accessory 201 is the theme pillow assembly and theatrical set pillow 202 is the cushioning member, however, the rectangular portion (202) is not shaped to further illustrates the forest like theme of

the pillow. It is not clear how the Examiner jumps to the outer perimeter of the character toy bear when the claim is directed to the outer perimeter of the theme pillow assembly, the theme pillow assembly alleged to be theater accessory 201. Koenig shows a different embodiment in Figure 2A, but again, this embodiment may not have a cavity at all but rather a slot in between orthopedic pillow 4 and wall portion 7. By way of contrast, Appellants' Figure 6B illustrates a pillow having a front surface and a back surface connected along an outer perimeter the outline of which further indicates a Noah's Ark theme and where at least one item can be removeably stationed in cavity 620a as illustrated in Figure 1C. In addition, Appellants' Figure 5B has an outer perimeter barn shape further illustrating a barn theme where barn animals may be removeably situated in cavity 520a.

Regarding independent claim 34, Koenig does not teach a cushioning member comprising a cavity floor layer having an interior side connected an interior side of a back layer and at least one item removeably situated in the cavity. Appellants' set forth a shell comprising a cavity floor layer and a back layer connected together at the layer's interior surfaces. See Appellants' Figure 1G, specifically layers 146 and 148. By connecting cavity floor layer 146 and a pillow back layer 148, cavity floor layer 146 and cavity sidewall layer 144 are prevented from turning inside out (i.e., being pulled through the cavity opening) when an item is removed from cavity 120. Also, by attaching the cavity floor layer to the back layer the dimensions of the cavity floor are maintained while the cavity sidewalls are deliberately designed to billow inward to the cavity in between the cavity floor and cavity opening. This creates an area underneath the cavity sidewall billow and above the cavity floor where legs of a stuffed animal can be tucked, for example.

The rejection of independent claim 35 appears in error since claim 35 contains subject matter similar to the allowable subject matter of claim 13. Claim 35 includes "an attached structure

bridging at least a portion of said first cavity." See Appellants' Figure 2 showing attached structure 225 bridging cavity 220. For the reasons above and since Koenig discloses no such bridging structure it is requested that claim 35 be allowed.

Regarding independent claim 36, Koenig does not show a cover door and an opening in a first door. Clear explanation is requested if the Examiner persists with this rejection. Claim 36 sets forth an opening in the first door that is covered by a cover door. See Appellants' Figures 4A-D where first door 404 has an opening 456 covered by cover door 454. For all of the reasons above and since Koenig clearly teaches no such structure it is requested that claim 36 be allowed.

In addition to the structural features discussed as lacking above, Koenig does not teach a "theme pillow for playing peek-a-boo hide and seek with at least one item," and where said item is removeably situated in the pillow cavity.

Appellants' Response to 35 U.S.C. §103 Rejections.

B. The Examiner finally rejected claims 1-2, 4-12, 14-18 and 23-24 under 35 U.S.C. §103(a) as being unpatentable over Koenig in view of Klimenko.

Regarding independent claims 1 and 23, Appellants set forth a "cavity sidewall perimeter surface billows inward toward said first cavity to snuggly hold said at least one item." Claim 1, lines 17-18. These words were added to claim 1 in the Amendment mailed June 21, 2004. The amendment was made as a result of the Office Action, mailed Mar. 23, 2004, where claim 3 drawn to the cavity sidewall billowing was designated as allowable if rewritten in independent form. This was confirmed as a result of the Examiner's Interview of May 4, 2004, where it was agreed that this subject matter was considered allowable. It is unsettling that this subject matter has been rejected ever since, and since reference Koenig has been in the case all along. Please

recognize that Appellants are claiming a relationship between the billowing cavity sidewalls and an item removeably placed in the cavity, that is, the sidewalls billow to a sufficient degree to snuggly hold the item situated in the cavity.

a. Combination Destroys Or Renders The Base Reference Inoperable

The Examiner alleges that Koenig teaches the invention but for the cavity sidewall surface billowing inward toward the first cavity, and that, Klimenko teaches billowing of a cavity sidewall surface. The Examiner goes on to say that it would have been obvious to make the theater accessory of Koenig inflatable so as render the theater accessory inflatable for use and deflateable for convenient storage without occupying too much space.

The problem with applying the inflatable teaching of Klimenko to Koenig, is that, if the billowing was sufficient to "snuggly hold" the item situated in the cavity, then the billowing would render the theater accessory inoperable for its intended purpose. Billowing of theatrical set pillow 202 inner sidewalls would snuggly hold the puppet sleeve and puppets of Koenig and thus the puppets would lack mobility to perform in the theater. Further, Koenig teaches only foam fill with respect to the plush character toy pillow which seemingly would not billow at all. See col. 3, line 42. If a proposed modification renders the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. See MPEP 2143.01. Here, confinement of Koenig's puppets and puppet sleeve by the proposed billowing renders the prior art invention unsatisfactory as a puppet theater.

b. No Motivation To Combine

Furthermore, the rejection of claims 1-2, 4-12, 14-18 and 23-24 is predicated upon the combination of Koenig in view of Klimenko, yet, the references are from disparate, unrelated

arts. Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching, suggestion, or incentive supporting the combination.

The Koenig reference is drawn to a plush character toy pillow with puppet theater accessory. The Klimenko reference is drawn to plastic inflatable furniture having a recess for ice. The Examiner's rejection states that the motivation to combine Koenig and Klimenko is to make Koenig inflatable and thus deflateable for convenient storage. However, Koenig and Klimenko are from disparate, unrelated art. Koenig teaches a plush character toy pillow with sleep enhancing accessories. Klimenko teaches furniture made of plastic sheets. Appellants do not see how a furniture teaching can be applied to a pillow, and moreover how a plastic furniture teaching can be applied to a *plush* character toy pillow.

Further, the Klimenko reference is not in the same technical field as the present inventive pillow. All of the references must be either in the field of the inventors' endeavor or in a reasonably pertinent field in which a person of ordinary skill would reasonably be expected to look for a solution to the problem facing the inventor.

c. Hindsight

The Examiner appears troubled by allowing a pillow invention based on billowing since billowing to a degree is generally inherent in pillows. It is important to recognize that Appellants are claiming a relationship between the billowing cavity sidewalls of the pillow and the item removeably placed in the cavity. The sidewalls billow to a sufficient degree to snuggly hold the item situated in the cavity. This relationship ensures that the item will not simply fall out of the cavity. Trying to recreate this relationship from disparate arts using Appellants' own teachings is impermissible hindsight. The Examiner has not shown any teachings in the prior art

suggesting the relationship of snuggly holding at least one item in a pillow cavity by billowing cavity sidewalls.

d. Teaching Away From Combination

Prior art references must be considered in their entirety (i.e., as a whole), including disclosures that teach away from the claimed invention. Koenig teaches a plush character toy pillow made of "soft cuddly fabric" and an animal exterior of "soft artificial fur or felt type fabric," see Koenig's Abstract, lines 18-21. Koenig also teaches "a soft cushioned theatrical theater set pillow 202", see col. 5, lines 2-3. Klimenko teaches an inflatable sofa made of air impervious plastic sheets capable of holding ice. It would not have been obvious to one of ordinary skill in the art to apply the seemingly slick plastic sheet teaching (and thus the inflatable teaching) of Klimenko to Koenig when Koenig is primarily concerned with providing a *soft plush* toy. Applying the plastic sheeting of Klimenko to make Koenig's plush character toy pillow or Koenig's soft theatrical set pillow inflatable goes against Koenig's objective of providing a *soft* and *plush* toy.

e. Secondary Factors

In addition to the discussions above regarding non-obviousness, note it appears Appellants' invention is presently being copied. See Appendix C showing copy of a webpage from a leading gift company, Boyd Collection, LTD. The webpage shows a pillow entitled "Blue Peek-a-Boo Pillow" which infringes Appellants' federally registered trademark and appears to infringe some of the present claims. For this reasons, Appellants wish to expedite this application to issuance.

Furthermore, Appellants are having commercial success in their invention. Appellants have attended several gift shows where the public and distributors are very attracted to their pillow invention. Distributors are particularly interested because the pillows are creative and unique

from anything else they have seen on the market. Appellants are selling their pillows on-line (www.purplecowcreations.com) and to high-end consumer stores; their product is a high quality pillow product. Appellants look forward to licensing opportunities upon allowance of this application. Appellants continue to request in earnest, guidance on how to put this application in condition for allowance with quality claims sufficiently covering Appellants' inventive subject matter.

In addition to the arguments above regarding independent claims 1 and 23, each of the dependent claims which do not fall with independent claims 1 or 23 are discussed in the following.

Regarding claim 5, Koenig does not teach or suggest providing a door that has a larger circumference than the cavity opening. Koenig shows a base 205 in Figures 6 being only as wide as the opening to the puppet theater accessory 201, note the width of base 205 where the base connects to a inside corner edge of theater set pillow 202. The base 205 of Koenig is not really a door at all, but a base for "pop up landscape or fantasy features 206, 207." See col. 5, line 7. The theater is not useable unless base 205 is laid out. Koenig has no motivation to hide the theater opening since the theater is only used when the base 205 is laid out. Suggesting that Koenig make the base larger is using Appellants' own teaching in impermissible hindsight.

Claim 5 specifies that the first door has a larger circumference than first cavity opening so as to overlay a portion of said front surface. Providing a door of larger circumference than the opening ensures the opening is hidden from view. Koenig has no motivation to provide a larger base 205, whereas Appellants purposely provide a door of larger circumference than the cavity opening so as to conceal the cavity and the cavity's contents. See for example Appellants' Figure 1A where door 104 (having trim 112) is close completely concealing cavity 120, cavity opening

126 and bear item 128 being shown in Figures 1B-1C. Door 104 is actively used for playing peek-a-boo hide and seek, that is, a child will repeatedly open and close door 104 revealing and concealing cavity 120 playing hide-and-seek with bear item 128 situated in cavity 120, for example. Making the door of a larger circumference is not merely a design choice as alleged since a larger circumference is purposely provided to ensure the cavity and cavity opening are hidden from view. Moreover, when the cavity and cavity opening are hidden from view a person new to the pillow not clued into what lies behind the door or that the door is a door at all.

Regarding claim 7, the Examiner's arguments are internally inconsistent. With regard to claim 1, the Examiner relies on Klimenko to provide an "inflatable filler" (Office Action, Page 6, line 19) version of Koenig's theater accessory. Now with respect to claim 7, the Examiner states it would have been obvious to substitute quilted fabric for Koenig's felt type fabric. If quilted fabric was applied to Koenig's theater accessory, the theater accessory would no longer be air impervious and thus not inflatable due to air leaks at the quilt stitches. Therefore, the combination of Koenig and Klimenko cannot be further modified by providing a shell comprising quilted fabric material and thus this rejection is improper.

Regarding claim 8, Koenig does not appear to teach a cavity floor layer surface attached proximate to a back surface for preventing the cavity sidewall perimeter surface and the cavity floor surface from turning inside out. Koenig's teaches that theater accessory 201 shown in Figure 6 may be removeably attached to wall portion 7 with VELCRO for example. See col. 5, lines 10-15. The logistics of this attachment and where the VELCRO is applied is not clear. As mentioned, it is questionable whether the theater accessory backdrop is actually cavity floor. Assuming for the sake of argument that the backdrop is a cavity floor, and not a partially attached curtain, removeably attaching theater accessory 201 to wall portion 7 would not prevent

the backdrop from turning inside out through the theater opening, since the backdrop would seemingly separate from its temporary (i.e., VELCRO) connection and come forward through the theater opening. In contrast, Appellants' pillow illustrated in Figure 1G has a cavity floor surface 124 attached proximate to a back surface 136. When the cavity floor surface is connected to the back surface, removing stored items from the cavity or even pulling on the cavity sidewall surface will not cause the cavity to turn inside out, that is, the cavity floor surface and the cavity sidewall surface of the present invention will not come up through the cavity opening.

Regarding claim 9, Koenig does not teach a first door securing means or a convexly contoured front surface. Theater accessory 201 shown in Koenig's Figure 6 has a flat front and no first door securing means. The plush character toy pillows of Koenig's Figures 1-2 and 1A-2A each appear to have a front surface (2) that is convexly contoured, and securing means 8 for holding orthopedic pillow 4 in an upright position. However, this front surface (2) does not have a first door conforming to it, or a cavity revealed by a first door. Base 205 in Figure 2A does not have a securing means, moreover wall portion 7 does not appear convexly contoured. If the Examiner is using the embodiment of Figure 2A, then all the limitation of claim 1 and claim 9 must be found in this embodiment. Here, there is even less of a reason to apply Klimenko's plastic inflateable teaching since the objective of Koenig is to provide a "plush character toy headrest pillow 1" which is preferably made of "soft artificial fur or felt type fabric", col. 3, lines 43-44. Moreover, it is not clear from Koenig's Figure 2A that there is a theater accessory cavity and not merely a slot for the puppet sleeve, note the fur texture in Figures 2 and 2A and the lack of any cavity sidewalls. The embodiment of Figure 2A is so unclear that one must be careful not to add words or structure to the reference. Seemingly providing a cavity in Figure 2A at theater

accessory 201 is illogical since this would create a void in the otherwise ergonomic backrest. For these reasons, and if Klimenko is applied for inflatable billowing then the plastic sheet material makes Koenig's pillow not plush. Koenig's objective is to provide a "plush, character toy" "preferably made of soft cuddly fabric" such as "soft artificial fur or felt" (col. 3, lines 40-44) and this is defeated by using Klimenko's plastic sheets.

Regarding claim 10, it is not clear which embodiment the Examiner is relying on. The Examiner mentions reference numeral 4 (orthopedic pillow 4) in the rejection. Reference numeral 4 appears in the embodiment of Figures 1-2 and in a separate embodiment shown in Figures 1A-2A, the latter embodiment being unclear as to whether there is actually a cavity, as discussed above. If the Examiner is referring to the embodiment of Figures 1-2, where theater accessory 201 of Figure 6 is removeably attached to wall portion 7 (col. 5, lines 10-15), then there is no second door attached to the cushioning member, the cushioning member seemingly being addressed as theatrical set pillow 202 of removable theater accessory 201.

Claim 12 sets forth a third door underlying the first door. Here, the Examiner references foldable portion 4a of Figures 1A-2A, see col. 5, line 28. Again, all the claimed features must be shown with respect to this embodiment, a cavity among other structure appears lacking. Appellants' second door and third door are shown in the present Figure 5B, where barn doors 504a and 504b are the first and second doors, and door 504c is the third door underlying the first and second doors. Koenig shows no such structure.

Claim 14 is drawn to an outer perimeter of the cushioning member having a shape to further illustrate the theme of the pillow. The theater accessory 201 appears to have a theatrical set pillow 202 which the Examiner alleges is the cushioning member, however, the outer perimeter shape of the theatrical set pillow 202 is rectangular which does not further indicate the forest like

theme of the set pillow. When theater accessory 201 is removeably attached to the plush character toy, the outer perimeter of the cushioning member (theatrical set pillow) is still rectangular. It is not understood how the Examiner can jump to the conclusion that the plush character toy outer perimeter of either Figures 1-2 or Figures 1A-2A can fulfill the limitations of claim 14 and all the limitations of claim 1 from which claim 14 depends. Note, Appellants' illustrate an outer perimeter shape in Figure 5B being a barn shape that further illustrates the barn theme where stuffed farm animals can be situated in the cavities, for example.

Regarding claim 16, the Examiner alleges that it would have been obvious to employ a second cavity "since it is generally recognized that duplication of parts is an obvious modification in the art." Office Action, page 9, lines 4-5. Appellants argue that there must be motivation to duplicate parts, that is, some greater benefit gained by duplicating parts. Here, assuming for the sake of argument that Koenig does show a cavity in theater accessory 201, there does not appear to be motivation to provide a second cavity, in fact, a second cavity having a second puppet sleeve would be difficult to operate having one hand already in the puppet sleeve of the first theater accessory. Therefore, it is not merely an obvious duplicate cavities.

Regarding claim 17, neither Koenig nor Klimenko teach or suggest a cavity in an outer perimeter surface. Claim 17 sets forth a second cavity located in an outer perimeter surface between a front surface and back surface. See for example, Appellants' Figure 6C which shows cavity 620c, and Figure 6E which shows cavities 620c and 620d located in outer perimeter surface 660. No such structure is found in Koenig or Klimenko. If the Examiner persists in this rejection clear explanation is requested.

Regarding claim 18, Koenig does not teach or suggest a second cavity thus does not teach or suggest a second door. Since providing a second cavity is not an obvious design choice, a second door for concealing a second cavity is also not obvious.

Regarding independent claim 23, Koenig does not teach billowing for snuggly holding yet removeably receiving an item. For all of the reasons discussed above with respect to independent claim 1, and since neither Koenig nor Klimenko teach or suggest the claimed relationship of the billowing cavity sidewall for snuggly holding an item it is requested that claim 23 be allowed. Also as discussed above, Koenig does not teach a first door connected *in between* the outer perimeter and the first cavity opening. And, Koenig does not teach a door having a greater circumference than first cavity opening. Even if Klimenko was combinable with Koenig, Klimenko does not cure each of these deficiencies.

Regarding claim 24, again Koenig does not appear to teach a removeable item, the puppets and puppet sleeve being attached to the puppet theater accessory. See Koenig col. 5, lines 3-4.

For these reasons and others Appellants respectfully request these claims be allowed.

C. The Examiner finally rejected claims 26, 28 and 32 under 35 U.S.C. §103(a) as being unpatentable over Koenig.

Regarding claim 28, Koenig does not teach or suggest providing a door that has a larger circumference than the cavity opening. Koenig shows a base 205 in Figures 6 being only as wide as the opening in theater set pillow 202, note the base width where the base 205 connects. The base 205 of Koenig is not really a door at all, but a base for "pop up landscape or fantasy features 206, 207." See, col. 5, line 7. The theater is not useable unless base 205 is laid out. Koenig has no motivation to hide the theater opening since the theater is only used when the base

205 is laid out. Suggesting that Koenig make the base larger is using Appellants' own teaching in impermissible hindsight. Claim 28 specifies that the door has a larger circumference than the cavity opening so as to overlay a portion of the first surface. Appellants purposely provide a door of larger circumference than the cavity opening so as to conceal the cavity and the cavity's contents. See for example Appellants' Figure 1A where door 104 (having trim 112) is close completely concealing cavity 120, cavity opening 126 and bear item 128 shown in Figures 1B-1C. Door 104 is actively used for playing peek-a-boo hide and seek, that is, a child will repeatedly open and close door 104 revealing and concealing cavity 120 playing hide-and-seek with bear item 128 situated in cavity 120, for example. Making the door of a larger circumference is not merely a design choice as alleged since a larger circumference is purposely provided to ensure the cavity and cavity opening are hidden from view. Moreover, when the cavity and cavity opening are hidden from view a person new to the pillow not clued into what lies behind the door or that the door is a door at all.

Regarding claim 32, Koenig does not teach a second cavity located in an outer perimeter. Providing a second cavity located in an outer perimeter is not merely duplication of parts, since Koenig does not show any cavities in an outer perimeter. Claim 32 sets forth a second cavity located in an outer perimeter surface between a front surface and back surface. See for example, Appellants' Figure 6C which shows cavity 620c, and Figure 6E which shows cavities 620c and 620d located in outer perimeter surface 660. Koenig does not teach any such cavity in an outer perimeter surface.

For these reasons and others Appellants respectfully request that these claims be allowed.

(10) *Conclusion*

The rejections submitted in the Office Action of June 16, 2005 should be reversed for the reasons recited above. Allowance of all claims 1-2 and 4-36, therefore, respectfully requested.

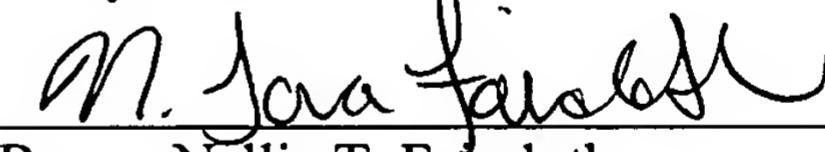
In accordance with 37 C.F.R. §41.31 Appellants submit this Appeal Brief to the Board of Patent Appeals and Interferences. Filed concurrently herewith are a Notice of Appeal and the following fees:

- (a) \$250 for filing this Appeal Brief; and
- (b) \$250 for the Notice of Appeal.

It is believed that no additional fees are due in connection with this Appeal Brief. Please contact the undersigned should additional fees or information be required.

Respectfully submitted,


By: Julia S. Faircloth


By: Nellie T. Faircloth

Julia S. Faircloth
Nellie T. Faircloth
11025 NE Hurley Lane
Newberg, OR 97132

Dated: *Sept. 15, 2005*

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on this day of Sept. 15 2005
Print Name: Julia S. Faircloth
Signature: Julia S. Faircloth

Claims Appendix

1. (previously presented) A theme pillow assembly for playing peek-a-boo hide and seek with at least one item, comprising:

 a cushioning member, said cushioning member including a cushioning medium, a front surface and a back surface, said front surface and said back surface being connected along an outer perimeter of said cushioning member, said cushioning medium being between said front surface and said back surface;

 a first cavity, said first cavity recessed from said front surface into said cushioning member, said first cavity having a first cavity opening of a predetermined dimension, a first cavity sidewall perimeter surface, and a first cavity floor surface of a similar predetermined dimension, said first cavity sidewall perimeter surface connected to said first cavity floor surface, and said first cavity sidewall perimeter surface encircled by said cushioning medium;

 at least one item removeably situated in said first cavity;

 a first door connected to said front surface, and said first door being bendable and openable to an open position for revealing at least a portion of said first cavity and closeable to a closed position over said first cavity for concealing said at least a portion of said first cavity and said at least one item situated in said first cavity; and,

 wherein said first cavity sidewall perimeter surface billows inward toward said first cavity to snuggly hold said at least one item;

 wherein said first cavity opening generally maintains said predetermined dimension in said open position and in said closed position, and said first cavity floor surface generally maintains said similar predetermined dimension in said open position and in said closed position;

wherein said first cavity sidewall perimeter surface billows in between said first cavity opening and said first cavity floor surface, said first cavity sidewall perimeter surface at least partially obscuring said first cavity floor surface when said at least one item is removable situated in said first cavity and when said first cavity is empty; and,

wherein at least one of said cushioning member and said first door have indicia, said at least one item and said indicia together visually indicating an illustrated theme.

2. (previously presented) The theme pillow assembly of claim 1, wherein said at least one item includes a stuffed animal.

3. (canceled)

4. (original) The theme pillow assembly of claim 1, further comprising a sound device, and where said sound device emits a sound that further indicates said illustrated theme.

5. (original) The theme pillow assembly of claim 1, wherein said first cavity opening has a circumference and where said first door has a larger circumference than said first cavity opening circumference so as to overlay a portion of said front surface.

6. (original) The theme pillow assembly of claim 1, wherein said outer perimeter of said cushioning member has a generally rectangular outline, said outline encircling a cushioning

member frontal area, said first cavity opening encircling an opening area, and where said opening area is at least 18% of the size of said cushioning member frontal area.

7. (original) The theme pillow assembly of claim 1, wherein said cushioning member includes a shell, said shell housing said cushioning medium, and said shell comprising quilted fabric material.

8. (original) The theme pillow assembly of claim 1, wherein said first cavity floor surface is attached proximate to said back surface for preventing said first cavity sidewall perimeter surface and said first cavity floor surface from turning inside out.

9. (previously presented) The theme pillow assembly of claim 1, further including a securing means for securing said first door in said closed position, and wherein said first door is connected to said front surface, said first door opening by bending and said first door generally conforming to said front surface in said closed position, said front surface being convexly contoured.

10. (original) The theme pillow assembly of claim 1, further comprising a second door connected to said cushioning member.

11. (original) The theme pillow assembly of claim 10, wherein said first door and said second door conceal said first cavity when said first door and second door are in closed positions.

12. (original) The theme pillow assembly of claim 10, further comprising a third door, said third door underlying said first door when said first door is in said closed position.

13. (original) The theme pillow assembly of claim 1, further comprising an attached structure bridging at least a portion of said first cavity.

14. (original) The theme pillow assembly of claim 1, wherein said outer perimeter of said cushioning member has an outline that is shaped to further visually indicate said illustrated theme.

15. (previously presented) The theme pillow assembly of claim 1, wherein said cushioning member includes an outer perimeter surface, said outer perimeter surface connected to an outer perimeter of said front surface and connected to said back surface, said outer perimeter surface providing depth to said cushioning member.

16. (original) The theme pillow assembly of claim 15, further comprising a second cavity, said second cavity having a second cavity perimeter sidewall surface which generally encircles a three dimensional void of said second cavity, said second cavity generally encircled by said cushioning medium.

17. (original) The theme pillow assembly of claim 16, wherein said second cavity is in said outer perimeter surface and extending in an inward direction between said front surface and said back surface.

18. (original) The theme pillow assembly of claim 16, further comprising a second door, said second door having a closed position for concealing said second cavity and an open position for revealing said second cavity.

19. (original) The theme pillow assembly of claim 1, further comprising a tunnel, said tunnel having a tunnel opening in said first cavity sidewall perimeter surface, and said tunnel being a passageway located in between said front surface and said back surface.

20. (original) The theme pillow assembly of claim 1, further comprising a cover door and an opening in said first door, said cover door covering said opening in said first door in a closed position and exposing said opening in said first door in an open position, said cover door pivotally connected to said first door.

21. (original) A theme pillow kit comprising the theme pillow assembly of claim 1, a blanket, and a container, said container sized to hold said theme pillow assembly and said blanket, at least one of said blanket and said container having indicia which together with said cushioning member and said item visually indicates said illustrated theme.

22. (original) The theme pillow kit of claim 21, wherein said container is a carrying bag and includes a transparent portion and trim portion, said trim portion having indicia that coordinates with said indicia on said at least one of said cushioning member and said first door.

23. (previously presented) A cushion article for removeably receiving an item, comprising:

 a first surface having an outer perimeter;
 a second surface connected to said first surface at said outer perimeter;
 a cushioning medium, said cushioning medium located between said first surface and said second surface;

 a first cavity, said first cavity being a three dimensional void encircled by said cushioning medium and being generally encircled by said first surface, said first surface including a front surface, a first cavity sidewall perimeter surface and a first cavity floor surface, said first cavity sidewall perimeter surface and said first cavity floor surface generally defining said three dimensional void, said first cavity sidewall perimeter surface billowing toward said three dimensional void, at least when said void is empty, for snuggly holding yet removeably receiving the item, a first cavity opening to said first cavity being encircled by said front surface;
and,

 a first door, said first door connected to said first surface at a location in between said outer perimeter of said cushioning member and said first cavity opening and openable to an open position and closeable to a closed position, said first door overlaying said first cavity in said closed position, and said first door having a circumference greater than a circumference of said first cavity opening yet smaller than a circumference of said outer perimeter.

24. (original) The cushion article of claim 23, in combination with a removable item, and where at least a portion of said first surface and said first door have indicia which together with said item visually illustrate a theme.

25. (previously presented) A theme pillow assembly for concealing and revealing an item comprising:

 a first layer of material;

 a second layer of material connected to said first layer of material;

 cushioning medium between said first layer and said second layer;

 a cavity having an opening, said first layer of material including a front layer, a cavity sidewall perimeter layer and a cavity floor layer, said cavity sidewall perimeter layer being encircled by said cushioning medium, said cavity opening and said cavity floor layer similarly sized and similarly shaped, said cavity opening and said cavity floor layer generally maintaining said size and shape;

 an item removeably stationed in said cavity;

 a third layer of material attached to said first layer of material, said third layer of material being a door covering at least a portion of said cavity opening, said third layer of material attached to pivotally open to an open position and pivotally close to a closed position, said third layer attached in between said opening of said cavity and an outer perimeter of said first layer of material; and,

wherein at least one of said first layer of material and said third layer of material bear indicia which together with said item indicate a theme.

26. (previously presented) The theme pillow assembly of claim 25, wherein said item includes a stuffed toy.

27. (previously presented) The theme pillow assembly of claim 25, further comprising a sound device.

28. (previously presented) The theme pillow assembly of claim 25, wherein said cavity opening has a circumference and where said third layer has a larger circumference than said cavity opening circumference so as to overlay a portion of said first layer of material.

29. (previously presented) The theme pillow assembly of claim 25, wherein said cavity floor layer is attached to said second layer for preventing said cavity sidewall perimeter layer and said cavity floor layer from turning inside out.

30. (previously presented) The theme pillow assembly of claim 25, wherein an outer perimeter of said theme pillow assembly has an outline that is shaped to further indicate said theme.

31. (previously presented) The theme pillow assembly of claim 25, further comprising a outer perimeter layer of material, said outer perimeter layer of material connected to an outer perimeter

of said first layer of material and an outer perimeter of said second layer of material, said outer perimeter layer of material providing depth to said theme pillow assembly.

32. (previously presented) The theme pillow assembly of claim 31, further comprising a second cavity, said second cavity having a second cavity sidewall perimeter surface which generally encircles a three dimensional void of said second cavity, said second cavity generally encircled by said cushioning medium.

33. (previously presented) The theme pillow assembly of claim 25, further comprising a tunnel, said tunnel having a tunnel opening in said cavity sidewall perimeter layer, and said tunnel being a passageway located in between said first layer and said second layer.

34. (previously presented) A theme pillow assembly for playing peek-a-boo hide and seek with at least one item, comprising:

 a cushioning member, said cushioning member including a cushioning medium, a front surface and a back surface, said front surface and said back surface being connected along an outer perimeter of said cushioning member, said cushioning medium being between said front surface and said back surface;

 a first cavity, said first cavity recessed from said front surface into said cushioning member, said first cavity having a first cavity opening, a first cavity sidewall perimeter surface and a first cavity floor surface, said first cavity sidewall perimeter surface connected to said first

cavity floor surface, and said first cavity sidewall perimeter surface encircled by said cushioning medium;

at least one item removeably situated in said first cavity;

a first door connected to said front surface, and said first door openable to an open position for revealing at least a portion of said first cavity and closeable to a closed position over said first cavity for concealing said at least a portion of said first cavity and said at least one item situated in said first cavity;

wherein said cushioning member includes a shell, said shell housing said cushioning medium, and said shell comprising layers of fabric material, said first cavity floor surface on an exterior side of a first cavity floor layer of fabric material, said back surface on an exterior side of a back layer of fabric material, said first cavity floor layer having an interior side and said back layer having an interior side, said first cavity floor layer interior side and said back layer interior side connected without said cushioning medium intervening; and,

wherein at least one of said cushioning member and said first door have indicia, said at least one item and said indicia together visually indicating an illustrated theme.

35. (previously presented) A theme pillow assembly for playing peek-a-boo hide and seek with at least one item, comprising:

a cushioning member, said cushioning member including a cushioning medium, a front surface and a back surface, said front surface and said back surface being connected along an outer perimeter of said cushioning member, said cushioning medium being between said front surface and said back surface;

a first cavity, said first cavity recessed from said front surface into said cushioning member, said first cavity having a first cavity opening, a first cavity sidewall perimeter surface and a first cavity floor surface, said first cavity sidewall perimeter surface connected to said first cavity floor surface, and said first cavity sidewall perimeter surface encircled by said cushioning medium;

at least one item removeably situated in said first cavity;

a first door connected to said front surface, and said first door openable to an open position for revealing at least a portion of said first cavity and closeable to a closed position over said first cavity for concealing said at least a portion of said first cavity and said at least one item situated in said first cavity;

further comprising an attached structure bridging at least a portion of said first cavity; and,

wherein at least one of said cushioning member and said first door have indicia, said at least one item and said indicia together visually indicating an illustrated theme.

36. (previously presented) A theme pillow assembly for playing peek-a-boo hide and seek with at least one item, comprising:

a cushioning member, said cushioning member including a cushioning medium, a front surface and a back surface, said front surface and said back surface being connected along an outer perimeter of said cushioning member, said cushioning medium being between said front surface and said back surface;

a first cavity, said first cavity recessed from said front surface into said cushioning member, said first cavity having a first cavity opening, a first cavity sidewall perimeter surface and a first cavity floor surface, said first cavity sidewall perimeter surface connected to said first cavity floor surface, and said first cavity sidewall perimeter surface encircled by said cushioning medium;

at least one item removeably situated in said first cavity;

a first door connected to said front surface, and said first door openable to an open position for revealing at least a portion of said first cavity and closeable to a closed position over said first cavity for concealing said at least a portion of said first cavity and said at least one item situated in said first cavity;

a cover door and an opening in said first door, said cover door covering said opening in said first door in a closed position and exposing said opening in said first door in an open position, said cover door pivotally connected to said first door; and,

wherein at least one of said cushioning member and said first door have indicia, said at least one item and said indicia together visually indicating an illustrated theme.

Appendix A
U.S. Patent Number 6,434,769 to Koenig.

This reference was entered into the record originally by Appellants. See the Information Disclosure Statement filed on with the application on Sept. 12, 2003.

Appendix B
U.S. Patent Number U.S. Patent Number 5,951,111 to Klimenko

This reference was newly entered into the record by the Examiner in the final Office Action mailed June 16, 2005.

Appendix C
Secondary Consideration - Copying by others

See http://www.boydsstuff.com/itempage/item_queries.cfm?IN=810159

A copy of this webpage is attached. Note the following text from that webpage.

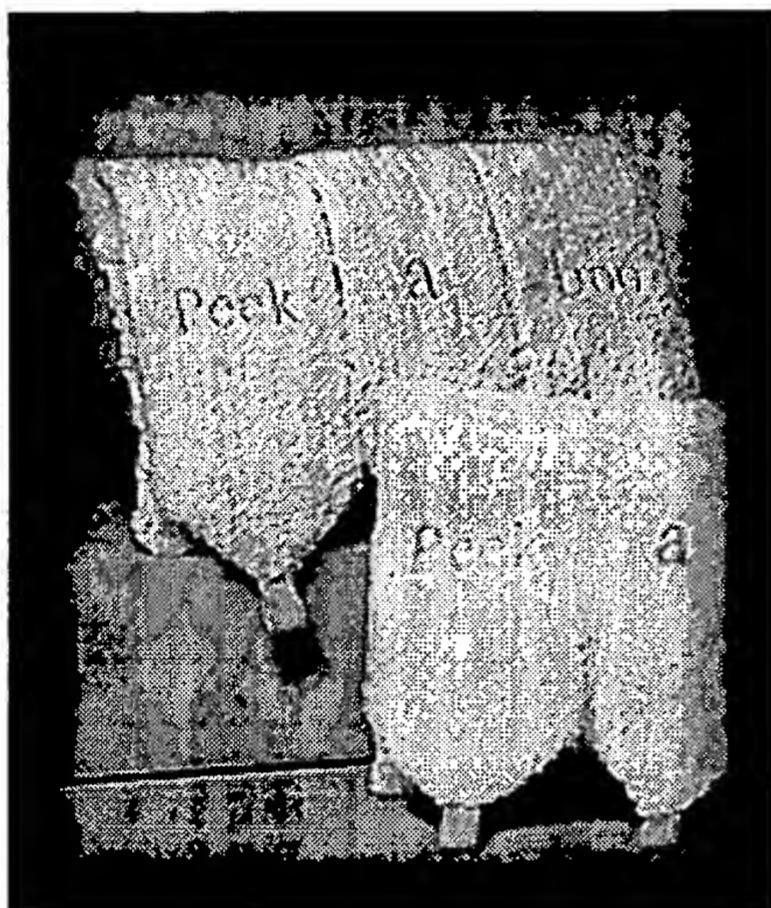
"Blue Peek-a-Boo Pillow"

"Season Introduced: SPRING 2005"

"Peek-a-boo pillow makes playtime with baby so much fun! Soft chenille design features three seersucker-lined and embroidered flaps. Lift each to reveal a miniature Boyds friend that rests inside a cozy seersucker insert. (pink-bear, duck, and bunny; blue-lamb, bear, and dog)."



Boyd's Home Baby



Blue Peek-a-Boo Pillow

Vital Statistics

F.o.B. members, please login

Peek-a-boo pillow makes playtime with baby so much fun! Soft chenille design features three seersucker-lined and embroidered flaps. Lift each to reveal a miniature Boyd's friend that rests inside a cozy seersucker insert. (pink-bear, duck, and bunny; blue-lamb, bear, and dog).

Vital Statistics

Item Number:	810159
Season Introduced:	SPRING 2005
Height:	9"
Width:	14"
Materials:	chenille and plush
Poseable:	No
Status:	Current
Ltd. Edition:	No

Related Items

If you like Blue Peek-a-Boo Pillow, have a peek at this related Boyd's Stuff:
[Blue Star Picture Frame](#)

[Blue Heart Picture Frame](#)

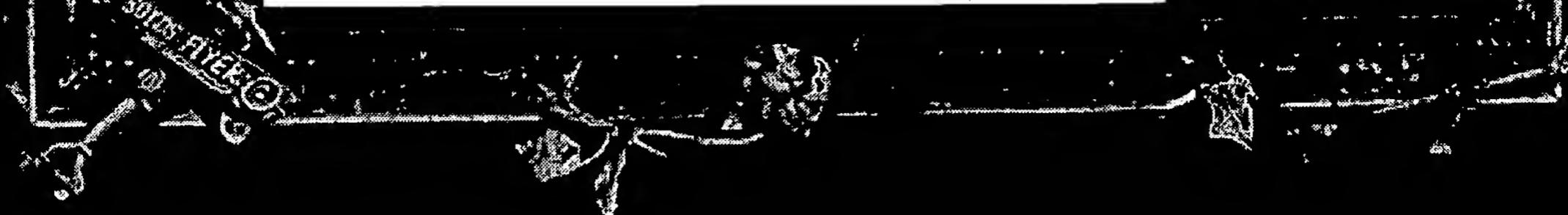
[Pink Peek-a-Boo Pillow](#)

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